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Supreme Court of the United States

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LINDA SIDOTI PALMORE, *Petitioner,*

—v.—

ANTHONY J. SIDOTI, *Respondent.*

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE AMERICAN JEWISH COMMITTEE AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF PETITIONER

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Interest of Amici*

The American Civil Liberties Union is a non-partisan organization of over 250,000 persons dedicated to the enforcement of our constitutional liberties. The American Jewish Committee is a national organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It believes this goal can best be accomplished by helping to eliminate all forms of racial discrimination and to promote the constitutional and civil rights of all Americans. The National Association for the Advancement of Colored People (NAACP) is the nation's largest black civil rights organization. The NAACP is dedicated to the realization of full racial equality and the elimination of racial

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* Letters of consent to the filing of this brief have been obtained from the parties and have been lodged with the Clerk of the Court.

stereotypes which limit the ability of each person to fully actualize his/her human potential and contribution to society.

Much of the struggle for constitutional rights during the past 100 years has centered on the repeated attempts by this Court to eliminate racism as a factor in American law. This case, involving as it does an explicit decision to deprive a mother of the custody of her child merely because she remarried a man of another race, is as flagrant an example of state-enforced racism as has reached this Court in recent years. Accordingly, amici submit this brief in the hope that the Court will find it of assistance in dealing with the persistence of a mode of legal analysis which many had hoped irrevocably banished from our legal system.

Statement of the Case

On May 20, 1980, petitioner, Linda Sidoti Palmore, a white woman, was awarded custody of her three year old daughter, Melanie, pursuant to a Florida divorce decree which found her a "fit and proper person to have such custody." Approximately one year later, Melanie's father, who had since re-married, sought to persuade the Florida courts to award him custody by alleging that petitioner was living with a "black male", whom she married shortly thereafter. The Florida court directed that an investigation be carried out by John C. Knight, Jr., a court counsellor. Mr. Knight, who had in a previous case already recommended that a mother be deprived of custody because she had re-married outside her race,[1] predictably found:

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[1] Mr. Knight was the investigating officer in Niles v. Niles, 299 So.2d 162 (1974), in

> The wife has chosen for herself and for her child, a life-style unacceptable to the father and to society.
>
> No parent has the right to commit a child to the uncertainty of adversity beyond the limit of reasonable, calculable risks.
>
> There is no question of parent love for child, nor child's love for parent. The child, however, is, or at school will be, subject to environmental pressures not of choice.
>
> It is recommended custody of the child be awarded to the father.

Echoing the sentiments of Mr. Knight, a circuit judge for Hillsborough County, Florida, vacated the decree awarding custody to petitioner and, instead, awarded custody to Melanie's father, because in his opinion:

> . . . despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age

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which the Florida District Court of Appeal upheld a change of custody based in large part on an inter-racial remarriage.

> and thus more vulnerable to peer pressure, suffer from the social stigmatization that is sure to come.

The Second District Court of Appeal affirmed without opinion, precluding appeal to the Florida Supreme Court.

The only changed circumstance which led the Florida court to remove Melanie from her mother's custody was petitioner's re-marriage to a black man. This appeal raises the question of whether race may play such a dominant role in a judge's decision to alter an existing custodial decree.

Summary of Argument

1. When a court modifies an existing custodial decree because a white custodial parent has married a black man, it utilizes race as the criterion for judicial decision-making. Such race-dominated adjudication violates an absolute ban on the use of race

as a factor in our law, except in remedial contexts.

2. If race is to play any role in our law at all, it must be justified by a factual showing demonstrating the necessity for its use. No such showing was even attempted in this case.

3. The only justification offered by the court below for removing custody based on an interracial re-marriage was fear of the reaction of bigots in the community. Such surrender to the social blackmail of bigots is constitutionally forbidden.

4. A decision to remove custody as the result of an interracial remarriage impermissibly burdens the constitutional right to marry.

5. The use of a "best interest" standard to overturn an existing custodial decree violates the void-for-vagueness doctrine because it vests uncontrolled discretion in a judge

to interfere with constitutionally protected relationships.

Argument

I. A COURT MAY NOT ALTER AN EXISTING CUSTODIAL DECREE BECAUSE THE CUSTODIAL PARENT ENTERS INTO AN INTERRACIAL MARRIAGE.

When, as here, a court modifies an existing custodial decree because the custodial parent has married outside her or his race, it utilizes race as an operative -- indeed, the controlling -- element in reaching its decision. Such a race-dominated approach to adjudication is unconstitutional on three levels: First, it is contrary to repeated attempts by this Court to prevent race from playing a role in our legal system, except in remedial settings; second, it overlooks the clear teaching of this Court that if race is to play a role in our law, it must be pursuant to a showing of factual necessity; and third, it constitutes a wholly unnecessary surrender to a form of social blackmail imposed by persons in the community who refuse

to accept interracial marriage as acceptable behavior.

A. The Civil War Amendments To The Constitution Absolutely Forbid Race from Playing A Role In Our Legal System, With The Exception Of Remedial Action Deemed Necessary To Correct The Results Of Past Racial Discrimination.

This nation fought a bloody Civil War to free itself from slavery and the legal manifestations of racism. As the first Justice Harlan noted in his prophetic dissent in Plessy v. Ferguson, 163 U.S. 537, 555 (1896), the effect of the 13th, 14th and 15th Amendments was to render the Constitution "color-blind." Had we heeded Justice Harlan's lone voice in Plessy, we would have been spared the anguish of a half-century of racial oppression and would not now be confronted with the question of the extent to which a color-blind Constitution permits, and even requires, race conscious remedial action designed to eliminate the fruits of past

racism. However, with the exception of such race-conscious remedial action -- voluntary or otherwise -- Justice Harlan's vision of a legal system in which race plays absolutely no role is the law of the land. Beginning with Strauder v. West Virginia, 100 U.S. 303 (1880), and Ex parte Virginia, 100 U.S. 339 (1880), this Court has repeatedly sought to exclude race as an element in adjudicating the rights of parties to litigation.[2/] The

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[2/] Race-conscious jury selection was invalidated in Strauder and Ex parte Virginia; race-conscious administration of local law was invalidated in Yick Wo v. Hopkins, 118 U.S. 356 (1886); race-conscious definition of voter qualifications was invalidated in Ex parte Siebold, 100 U.S. 371 (1879); Ex parte Yarborough, 110 U.S. 651 (1884); Guinn v. United States, 238 U.S. 346 (1915); Nixon v. Herndon, 273 U.S. 536 (1927); and Lane v. Wilson, 307 U.S. 268 (1939); race-conscious definition of electoral districts was invalidated in Gomillion v. Lightfoot, 364 U.S. 339 (1960); the enforcement of race-conscious restrictive covenants was invalidated in Shelley v. Kraemer, 334 U.S. 1 (1948) and Barrows v. Jackson, 346 U.S. 249 (1953); the first Justice Harlan's vision was fulfilled when

clear teaching of this Court is that absent a showing of need for remedial action,[3] our

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race-conscious public school enrollment was invalidated in Brown v. Board of Education, 347 U.S. 483 (1954), and Cooper v. Aaron, 358 U.S. 1 (1958); race-conscious access to public parks and recreational facilities was invalidated in Watson v. Memphis, 373 U.S. 526 (1963); race-conscious seating in courtrooms was invalidated in Johnson v. Virginia, 373 U.S. 61 (1963); race-conscious identification of candidates for political office was invalidated in Anderson v. Martin, 375 U.S. 399 (1964); race-conscious limitations on the ability to marry were invalidated in McLaughlin v. Florida, 379 U.S. 184 (1964) and Loving v. Virginia, 388 U.S. (1967); race-conscious assignment of prisoners was invalidated in Lee v. Washington,. 390 U.S. 333 (1968); race-conscious tampering with the political process to block open-housing legislation was invalidated in Reitman v. Mulkey, 387 U.S. 369 (1967) and Hunter v. Erickson, 393 U.S. 385 (1969); race-conscious enforcement of state trespass laws was invalidated in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); and race-conscious searches and seizures were invalidated in Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975) and United States v. Brignoni-Ponce, 422 U.S. 873 (1975). See also Davis v. Mississippi, 394 U.S. 721 (1969).

[3] The use of race-conscious remedies for past discrimination is discussed in United Jewish Organizations v. Carey, 430 U.S. 144

legal system may not use race as a factor in enacting legislation, in administering existing legislation, or in adjudicating disputes. Yet by depriving Mrs. Palmore of custody of her daughter solely because she remarried a black rather than a white man, the Florida court made race not merely an operative fact, but the sole determinant for its decision. Such race-dominated adjudication cannot be squared with Justice Harlan's vision of a color-blind Constitution. Just as race cannot form the basis for jury selection, voting, re-apportionment, public school enrollment, access to public facilities, marriage, contract law or search and seizure, it cannot be used by a court to alter the custody of a child.

One case stands alone in stark contrast to

(1977); Regents of the State of California v. Bakke, 438 U.S. 265 (1978); United Steelworkers v. Weber, 443 U.S. 193 (1979); and Fullilove v. Klutznick, 448 U.S. 448 (1980).

Justice Harlan's vision of a color blind legal system -- this Court's unfortunate decision in Korematsu v. United States, 323 U.S. 214 (1944).[4] In Korematsu, this Court upheld, over the dissents of Justices Roberts, Murphy and Jackson, the relocation of Japanese Americans living in the Western United States to internment camps during the Second World War.[5] The continued existence of Korematsu as a precedent encourages judges, like the judge below, to believe that race may play a role in their courtrooms. The predictable result of the interaction between Korematsu and local prejudice is the emer-

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[4] See also, Hirabayashi v. United States, 320 U.S. 81 (1943); Ex parte Endo, 323 U.S. 283 (1944).

[5] The United States has consented to a coram nobis petition designed to vacate the Korematsu conviction, without, however, conceding the underlying invalidity of the law. Koramatsu v. United States, 27635 - WMHP (N.D. Cal. 1983).

gence of race as an element in custody proceedings in flagrant violation of the Civil War Amendments. Amici urge the Court to utilize this opportunity to repudiate Korematsu and to make explicit the principle which has animated the jurisprudence of this Court in the modern era: that, apart from necessary remedial programs, race may not, under any circumstances, be a factor in our legal system.

B. If Race Is To Play An Operative Role In Our Legal System, The Justification For Its Use Must Be Demonstrated By A Showing Of Factual Necessity, Which Has Not Even Been Attempted In This Case.

Amici have urged the Court to repudiate the suggestion in Korematsu that race, under extraordinary circumstances, may play a role in our legal system, other than in a remedial sphere. Even under Korematsu, however, Florida's use of race to determine custody can-

not withstand constitutional scrutiny. Justice Black, in his opinion for the Court in Korematsu, recognized the danger of permitting race to play even a limited role in our legal system:

> . . . all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. 323 U.S. at 216.

Thus, even under Korematsu, the use of race as a factor in deciding custody must be subjected "to the most rigid scrutiny" to determine wheteher there is a factual necessity which justifies race-conscious adjudication.

In Korematsu, the claim by military authorities of a threat to national security during wartime was deemed by a majority to provide a sufficient factual predicate for the

internment program. Whatever credence one gives to the Korematsu assessment,[6] if believed, it purported to provide a dramatic factual justification for a race-conscious internment program. No such factual predicate has been offered to justify Florida's adoption of a race-conscious custody program. Instead of factual support, the decision below rests solely on the "undifferentiated apprehension" that children living in a multi-racial home may suffer future harm at the hands of bigots in the community. Not a single fact was considered which might, even arguably, justify the use of race as the dominant factor in the award of custody. No attempt was made to survey the professional literature. No attempt was made to seek the

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[6] Serious allegations have been made that conscious mis-statements of fact were made to this Court in an effort to support the internment decision. Korematsu v. United States, 27635 - WMHP (N.D. Cal. 1983).

testimony of child psychiatrists, child psychologists or trained social workers. No attempt was made to develop a factual record on the impact of interracial marriage on children in general, or on Melanie, in particular. Instead of seeking facts, the court below simply assumed an ugly, stereotypical set of eventualities involving the possible persecution of Melanie by bigots because her stepfather was black. It is, amici believe, a welcome benchmark in our struggle against racism that such an ugly stereotype of reality may not be assumed. If it may be considered at all, it must be proved. Cf. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)

Even more significantly, no attempt was made to deal with the facts pertinent to Melanie herself. The court below simply ignored the fact that petitioner had been deemed the appropriate parent to raise Melanie

scarcely a year earlier and that she had provided her with a loving home. Similarly, the court did not consider the effect on Melanie of removing her from her mother, who had served as custodial parent from birth, and placing her in a new home. The actual harm to a child caused by uprooting her from the only home she has ever known far exceeded the speculative danger that she might someday be taunted by a bigot because her stepfather is black. In short, whether viewed as a general matter or in the particular, no facts whatever were adduced to support a finding that Melanie's custody should turn on the race of her step-father. Cf. Thompson v. City of Louisville, 362 U.S. 199 (1960).

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), five members of the Court considered the extent to which the Constitution permits race to be used in a plan designed to remedy the historic absence

of minority medical students at the University of California. Four members of the Court (Justices Brennan, White, Marshall and Blackmun) approved the use of race in a remedial context because, borrowing the standard of review used in gender discrimination cases, the California plan served important governmental objectives and was substantially related to the achievement of those objectives. Justice Powell, in a separate opinion, subjected the California plan to more stringent scrutiny pursuant to which the use of race must be shown to advance a compelling state interest by the least drastic means. Since, reasoned Justice Powell, the interest in achieving a diverse student body could have been attained by a less drastic plan, the California plan was invalid. However, whatever the disagreement between Justice Brennan and Justice Powell in Bakke concerning the appropriate standard of review, they

agreed that the use of race, even in a remedial context, must be justified by a rigorous factual showing. See also Fullilove v. Klutznick, 448 U.S. 448 (1980). In this case, where race is being used to stigmatize and burden, Florida has not attempted the level of factual justification demanded by Bakke for race-conscious remedial plans. Instead of facts, the Florida court substituted the untutored subjective assumptions of local officials. This Court has never permitted such "undifferentiated apprehension" of future harm to justify government activity in derogation of significant constitutional values. E.g. New York Times Co. v. United States, 403 U.S. 713 (1971); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969). Cf. Parham v. J.R., 442 U.S. 584 (1979). Thus, even if one assumes that Florida was not absolutely barred from using race to decide custody, its decision to uti-

lize such a disfavored criterion must be based on an overwhelming factual justification -- and not, as here, on mere subjective speculation.

The Supreme Courts of both Pennsylvania and Michigan have ruled that the race of a custodial parent's spouse may not be a factor in deciding whether to modify a pre-existing custodial decre. Myers v. Myers, 468 Pa. 134, 360 A.2d 587 (1976); Comm'n. ex. rel. Lucas v. Kreischner, 450 Pa. 352, 200 A.2d 243 (1973); Potter v. Potter, 372 Mich. 637, 127 N.W.2d 320 (1964); Edel v. Edel, 97 Mich.App. 266, 293 N.W.2d 792 (1980). See also Kramer v. Kramer, 297 N.W.2d 359 (Iowa 1980). In holding that race cannot be a factor in judicial decision-making, the courts of Pennsylvania and Michigan correctly perceived that both as a matter of law and as a matter of fact, the race of a step-parent is constitutionally irrelevant.

Several courts appear to permit race to be used as a factor, but not the factor, in custody determinations. Russell v. Russell, 399 N.E.2d 212 (Ill. App. Ct. 1979); Niles v. Niles, 299 So.2d 162 (1974). Since the court below viewed race as the determinative factor in its decision to alter custody, it went far beyond any existing authority. Moreover, those courts which seek to permit race to play a limited role in custody cases seek to draw a logically unsupportable line. If, standing alone, non-racial factors would not justify a change in custody, using race as the factor that tips the scales necessarily assigns it a determinative role. If, on the other hand, non-racial factors would justify a change of custody, no basis exists to inject race into the process at all.

C. The Only Justification Offered By The Court Below For Using Race As A Criterion To Determine Custody Is

Fear Of the Activities Of Bigots, Which May Never Found The Basis For Judicial Action.

Amici have argued that no facts were adduced demonstrating a genuine threat to the well-being of petitioner's child merely because she would be raised in an interracial home. Instead, the Court below speculated that persons in the community might torment Melanie when she was of school age and that such a danger justified a change of custody to her father's all-white home. Such speculations, wholly unsupported by facts, can hardly provide a basis for using race as a factor in granting custody. Moreover, in addition to the inherent factual weakness of such speculations, they violate the repeated admonition of this Court that government may not allow itself to be pressured into race-conscious decisions by the reprehensible activities of a small minority of bigots. Thus, in Cooper v. Aaron, 358 U.S. 1 (1958),

when the Little Rock school board sought to postpone integration because public hostility purportedly rendered it impossible to offer a sound educational program with black students in attendance, this Court responded in an extraordinary opinion signed by each of the nine Justices which refused to hold constitutional values hostage to racial bigotry in any form. Similarly, in Watson v. Memphis, 373 U.S. 526 (1963), the threat of adverse reaction by bigots was deemed insufficient to justify a delay in the desegregation of Memphis' parks. Indeed, in Shelley v. Kraemer, 334 U.S. 1 (1948), and Barrows v. Jackson, 346 U.S. 249 (1953), the Court held that judicial enforcement of agreements based on private bigotry constituted state reinforcement of discrimination in violation of the Fourteenth Amendment. Similarly, in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), the Court held that state enforcement of a custom

of discrimination was unconstitutional. See also, Lombard v. Louisiana, 373 U.S. 267 (1963); Bell v. Maryland, 378 U.S. 226 (1964); Commonwealth v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

In allowing its custody decisions to be dictated by fear of the future actions of prejudiced persons in the community, the Florida courts enabled such persons to prevent the enjoyment of constitutional rights. There is little practical difference between a statute forbidding interracial marriage enacted at the behest of bigots and a judicial policy, adopted through fear of bigots, which punishes parents who enter into interracial marriages by depriving them of custody of their children.

D. Depriving A Mother Of The Custody Of Her Child Because She Enters Into An Interracial Marriage Impermissibly Burdens The Fundamental Right to Marriage.

In addition to constituting an impermissible use of race as a criterion for determining custody, the decision to deprive a divorced mother of custody because of an interracial remarriage is an obvious and drastic burden on the exercise of a fundamental right. Since Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535 (1942), marriage and procreation have been recognized as fundamental constitutional rights. In Loving v. Virginia, 388 U.S. 1 (1967), this Court invalidated a ban on interracial marriage, stating:

> Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

388 U.S. at 12.

See also, McLaughlin v. Florida, 379 U.S. 184 (1964) (overruling Pace v. Alabama, 106 U.S. 583 (1883)). Finally, in Boddie v. Connecticut, 401 U.S. 371 (1971), this Court

invalidated filing fees in divorce actions by indigents as an unconstitutional impediment to remarriage. If a $60 filing fee for divorce impermissibly burdens the right to remarry, surely a policy which threatens a mother with loss of a child for remarrying outside her race does so as well.

Of course, the right to remarry is not absolute in the context of custody. If a woman chose to marry a homicidal maniac, for example, a change in custody could not be said to infringe her constitutional right to marriage. However, the court below cannot defend its judgment by arguing that it is designed not to punish the mother, but to protect the child. As amici have shown, no factual basis whatever exists for the assumption that being raised in an interracial home creates a risk of harm. Thus, even if, as a matter of theory, the characteristics of the

spouse might be deemed relevant to a custody decision, the constitutionally protected nature of the right to marry further heightens the need for a dramatic factual justification before the remarriage could justify loss of custody. In the absence of such a fact-based justification, the policy of considering an interracial remarriage in determining whether to alter pre-existing custodial arrangements cannot be defended as a means of protecting children. Rather, it is a classic penalty visited on parents who defy local mores by marrying out of their race.

II. THE POWER TO ALTER A PRE-EXISTING CUSTODIAL DECREE BECAUSE A JUDGE DEEMS IT IN THE CHILD'S "BEST INTEREST" VESTS OVERBROAD DISCRETION IN THE COURT.

The court below decided to remove Melanie from her mother's custody and to transfer custody to her father because the court believed that Melanie's "best interests" would not be served by being raised in an interracial household. Amici have argued that the Constitution flatly precludes such race--dominated adjudication. However, the fault for such a decision lies as much with Florida's failure to prescribe objective standards governing change of custody as with the lower court's impermissible use of race as an adjudicatory category. By authorizing judges to decide what is in the "best interests" of the child without providing objective decisional criteria, Florida law invites judges to make purely subjective custody decisions which cannot help but reflect their indivi-

dual social and political views.

When the state acts to alter or terminate an existing custodial relationship it intrudes upon a jealously protected legal relationship. Traditional principles of constitutional law require that whenever the state acts in so sensitive an area, it must follow carefully defined substantive standards. E.g. Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Smith v. Goguen, 415 U.S. 566 (1974); Colautti v. Franklin, 439 U.S. 379 (1979). One can hardly imagine a standard more violative of the void-for-vagueness doctrine than the wholly conclusory "best interest" standard applied in this case. Devoid of objective meaning, the "best interest" standard is nothing more than a surrender to unbridled discretion and subjective decision-making.

This Court has recognized that the use of such a subjective standard in sensitive areas of constitutional concern violates at least

three significant constitutional policies.

First, such a vague standard fails to provide notice to the potential target of adverse government action. E.g., Lanzetta v. New Jersey, 306 U.S. 451 (1939). Were petitioner to have consulted Florida law prior to her remarriage, she would have found no hint that raising a child in a loving, interracial home was not in the child's "best interests." See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Second, the "best interest" standard "impermissibly delegates basic policy matters to . . . judges and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, supra; Papachristou v. City of Jacksonville, 405 U.S. 156, 168-69 (1972); Connolly v. General Construction Co., 269 U.S. 385 (1926). The wholly conclusory nature of the "best

interest" standard virtually insures the arbitrary, unequal and discriminatory application of the law: arbitrary, in that the standard is purely subjective; unequal, in that the application of the standard will necessarily vary from one judge to another; and discriminatory, in that the standard invites reliance on prejudice and stereotypical thinking.

Third, the "best interest" standard, by vesting judges with virtually uncontrolled discretion, impermissibly delegates policy-making authority in an area of constitutional significance to the judiciary. Where, as here, law impinges on fundamental interests of constitutional significance, classic principles of separation of powers require that policy choices be made by a representative body -- the legislature. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

While reasonable persons will differ as to the degree of precision required of statutes in given contexts,[7] the best interest standard, unaided by any objective criteria, fails to satisfy even the most permissive standard of legislative specificity. Indeed, this Court has repeatedly noted the insuperable vagueness problem posed by the "best interest" standard.

In Smith v. Organization of Foster Fami-

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[7] The best interest standard is utilized in three contexts. In those cases involving state termination of parental rights, the need for specificty and precision is at its greatest. On the other hand, those cases in which the court sets an initial custodial arrangement between the natural parents call for greater flexibility, although not the wholly unrestrained discretion given by a best interest standard. The instant case, involving as it does, an attempt to alter an existing custodial arrangement at the behest of a natural parent, presents a stronger case for specificity than initial custodial arrangements, but a weaker case than termination proceedings. Whatever the variations among contexts, however, the "best interest" standard is too vague for use at any level.

lies, 431 U.S. 816, 835 n.36 (1977) the Court recognized that "judges . . . may find it difficult, in utilizing vague standards like 'the best interest of the child' to avoid decisions based on subjective values."

In Bellotti v. Baird, 443 U.S. 622, 655-56 (1979), four members of the Court (Justices Brennan, Marshall, Blackmun and Stevens) noted that a "best interest standard

> ... provides little real guidance to the judge . . . (whose) decision must necessarily reflect personal and societal values and mores whose enforcement is fundamentally at odds with privacy interests.

In Santosky v. Kramer, 455 U.S. 745, 752 (1982), the Court noted that vague standards give family court judges "unusual discretion to underweigh probative facts that might favor the parent."[8/]

8/ The Court has granted review in three recent cases challenging the vagueness inherent in an unadorned "best interest"

Since the "best interest" standard violates all three policies advanced by the void-for-vagueness doctrine, this Court should require articulation of more precise standards in custody settings by invalidating Florida's use of an unadorned best interest

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standard. In Doe and Roe v. Delaware, prob. jur. noted, 445 U.S. 942 (1980), app. dism. for want of a properly presented federal question, 450 U.S. 382 (1981), the Delaware Supreme Court invalidated the best interest standard, but affirmed the termination on alternative state grounds. In Johnson v. J.O.L., cert. granted 449 U.S. 818 (1980), judgment vacated and remanded, 449 U.S. 989 (1980), a decision upholding a "best interest" termination became moot prior to judgment. Finally, in Kirkpatrick v. Christian Homes of Abilene, cert. granted 459 U.S. _____ (1983), vacated and remanded 460 U.S. _____ (1983), a challenge to the best interest standard was vacated after a representation that relief was available under Texas law.

Lower courts have consistently invalidated the "best interest" standard. E.g. Alsager v. District Court of Polk County, 406 F.Supp. 10, 17-18 (S.D. Iowa 1975) aff'd on other grounds 545 F.2d 1136 (8th Cir. 1976); Roe v. Conn., 417 F.Supp. 769, 780 (M.D. Ala. 1976); In re Five Minor Children, 407 A.2d 198, 199 (Del. 1978); Davis v. Smith, 583 S.W.2d 37 (Ark. 1979); Linn v. Linn, 286 N.W.2d 765 (Neb. 1980).

standard to alter a pre-existing custodial decree.

Conclusion

For the reasons stated above, the decision of the court below should be reversed.

Respectfully submitted,

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